No. 96-818 (3)

In The

Supreme Court of the United States

October Term, 1996

Supreme Court, U.S.
FILED
DEC 20 1996
CLERK

ANTHONY MACERI; ANTONINO ENTERPRISES, INC.,

Petitioners,

vs.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, Cliffside Park

(Continued)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR MUNICIPAL RESPONDENTS ROBERT CIMMINO, CONSTRUCTION OFFICIAL; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, CLIFFSIDE PARK BOROUGH CLERK; STEPHEN T. BOSWELL, BOROUGH ENGINEER; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A LAW PARTNERSHIP; GERALD CALABRESE, INDIVIDUALLY AND AS MAYOR OF CLIFFSIDE PARK

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Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, a Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & CO. REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name,

Respondents.

QUESTIONS PRESENTED

I Does a refusal by the Federal Courts to retry issues of constitutional dimension already tried and appealed in State Courts constitute a deprivation of civil and constitutional rights?

II Where developer refuses to modify a 4 year old half-built structure to conform to zoning requirements adjudicated as valid, does demolition of the structure constitute "cruel and unusual punishment"?

III Is a developer, whose gravamen has been adjudicated and denied by State trial and appellate Courts, entitled to damages for legitimate action taken by a municipality, where no new legal or equitable duty or breach thereof has arisen?

PARTIES

The only real plaintiff party in interest in this Federal litigation, as in the State Courts, was the corporate plaintiff, owner of the property in question. That plaintiff corporation was an experienced "spot" builder in the defendant Borough. After litigating all issues, including those of federal import, in the State trial and appellate Courts, an action was commenced in the District Court seeking to vindicate the selfsame claims of the corporate plaintiff.

The individual plaintiff is the sole apparent officer, director and shareholder of plaintiff corporation. He was not an owner of the subject property and was not

a party in the prior State Court proceedings. His joinder in the Federal action would seem to serve no useful purpose other than to imply a distinction, which effects no legal difference.

In the Federal Courts, petitioners added an in terrorem factor by joining, as individual defendants, the Mayor, various municipal functionaries, the then Zoning Attorney, his firm and other persons alleged to be co-conspirators in a purported sinister plot of influence peddling and intrigue, all of which claims were broached, explored and determined in the prior State Court proceedings.

Germane to a discussion of the parties is the assessment of the District

Court Judge who dismissed the Complaint in this matter:

> ". . . I find him [plaintiff MACERI] to be **untruthful** with respect to his assets and with respect to his ability to understand the statement of his assets and that is based upon his statements prior to being confronted with the business banking statements of Antonino Enterprises for the first five months of this year." (District Court Proceedings of June 12, 1995 to reconsider Rule 11 sanctions against plaintiff MACERI - T-23-12) (Emphasis Supplied)

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OPINIONS BELOW

The **Law Division** of the Superior Court of New Jersey heard and determined 3 related cases, which were consolidated for trial*, two of which were brought by the corporate plaintiff. Therein, that Court fully adjudicated **all** of the issues later presented to the District Court below, **save** the matter of actual demolition of the subject building, which had not yet occurred, and found for defendants, dismissing all the three Complaints.

The **Appellate Division** of the Superior Court of New Jersey fully heard and determined the appeal** of the adverse decisions in the two cases brought by the corporate plaintiff herein and affirmed

the decisions below on all issues.

The Supreme Court of New Jersey denied certification*** to the Appellate Division in the two cases sought to be appealed by the corporate plaintiff.

The United States District Court for the District of New Jersey dismissed**** the Complaint of the plaintiffs-appellants herein, on defendants-respondents' Motion, on the basis of res judicata and the entire controversy doctrine. The new issue posed by the request for an injunction of the demolition of the subject building was denied, on the basis of no probability of success on trial.

The Hon. M. I. Greenberg, U.S.C.J. (3rd Cir.) denied***** petitioners' inter-

locutory Motion for leave to appeal the refusal of the District Court below to enjoin the demolition of the subject building, on the basis that petitioners had an **adequate remedy at law.**

On full appeal, the **Court of Appeals** for the Third Circuit affirmed***** the dismissal of the Complaint by the District Court, including the refusal to interfere with the demolition of the subject building.

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* ANTONINO ENTERPRISES, INC. **v.** FRANK POLLOTTA, CONSTRUCTION OFFICIAL OF CLIFFSIDE PARK; MAYOR & COUNCIL OF CLIFFSIDE PARK and CLIFFSIDE PARK BOARD OF ADJUSTMENT - **Docket No. BerL-4926-90**

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Supreme Court of New Jersey

**** ANTHONY MACERI AND ANTONINO ENTERPRISES, INC. v. ROBERT CIMMINO, Construction Official, BOROUGH OF CLIFFSIDE PARK, BRIAN T. McGUIRT, Cliffside Park Borough Clerk, STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS,

DIKTAS & HABEEB, a law partnership, THOMAS TOMEY, GERALD A. CALABRESE, Individually and as Mayor of Cliffside Park, CALABRESE & COMPANY REALTY, INC. and GERALD A. CALABRESE, JR. and JOHN DOE(S) -
Civil Action No. 93-3803 (JCL)
United States District Court

***** ANTHONY MACERI and ANTONINO ENTERPRISES, INC. **v.** ROBERT CIMMINO, Construction Official, BOROUGH OF CLIFFSIDE PARK, BRIAN T. McGUIRT, Cliffside Park Borough Clerk, STEPHEN T. BOSWELL, Boro. Engineer; CHRISTOS J. DIKTAS, DIKTAS & HABEEB, a law partnership, THOMAS TOMEY, GERALD A. CALABRESE, Individually and as Mayor of Cliffside Park, CALABRESE & COMPANY REALTY, INC. and GERALD A. CALABRESE, JR. -
Case No. 95-5224
Court of Appeals - Third Circuit

JURISDICTION

Petitioners invoke the jurisdiction set forth in 28 U.S.C.A. Sec. 1254(1), which authorizes review of decisions of the Court of Appeals by writ of certiorari. Issuance thereof is upon petition and is discretionary with the Court.

Petitioners have apparently satisfied the temporal requirements of S.C.U.S.R. 13(1) and 28 U.S.C.A. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED

1. Eighth Amendment:

"...[C]ruel and unusual punishments [shall not be] inflicted."

2. 42 U.S.C.A., Sec. 1983:

"Every person who, under color of any [State] statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges or immunities . . . shall be liable [for money damages]...."

3. 28 U.S.C.A., Sec. 1738:

"Such . . . judicial proceedings. . . shall have the same **full faith and credit** in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." (Emphasis Supplied)

COUNTERSTATEMENT OF THE CASE

Plaintiff ANTONINO was a building construction corporate entity. Plaintiff MACERI was its sole shareholder, officer, director and principal. Municipal permits were obtained for property owned by plaintiff ANTONINO for the construction of a large dwelling house, effectively containing 3 dwelling units. Prior to the actual commencement of construction, defendant BOROUGH amended its zoning to change the applicable zone from two family to one family residential homes and up-graded the "bulk" requirements of the zone in which plaintiff ANTONINO's property was located.

Upon notification of violation,

plaintiff ANTONINO applied to the appropriate municipal boards for "use" and "bulk" variances, agreeing to effectively eliminate the third dwelling unit. After hearing and plenary consideration, the variance applications were denied by such Boards of the defendant BOROUGH.

During the course of these variance efforts, plaintiff ANTONINO continued with construction so that the subject building was actually closed in completely, with windows, roof and rough plumbing (plaintiff MACERI's trade) installed.

Whereupon, plaintiff ANTONINO commenced two prerogative writs actions in the State Court, seeking to validate the construction, compel the variances, over-

turn the amended Zoning Ordinance and obtain redress for asserted violations of civil and constitutional rights. These actions were consolidated for trial and were fully tried for many days, within a period of months, with plaintiff having full and ample opportunity during that lengthy trial to adduce all its proofs concerning all of the issues raised.

The State Trial Court found against plaintiff ANTONINO in both actions, which decisions was unanimously affirmed on plenary consolidated appeal by the Appellate Division. The New Jersey Supreme Court denied Certification. Antonino Enterprises, Inc. v. Cliffside Park Planning Board and Antonino Enterprises, Inc. v.

al., 133 N.J. 433 (1993).

Upon conclusion of the full litigation cycle in the State Courts, plaintiffs were advised by defendant BOROUGH that UNLESS the subject building was rendered conforming to the applicable zoning (use and bulk requirements), it would be demolished. **Petitioners made no effort to modify said building to achieve zoning compliance** and the defendant BOROUGH commenced the extensive public bidding process for demolition.

Prior to completion of the demolition bidding process by the defendant BOROUGH, petitioners filed their action in the U. S. District Court consisting of the **self-same gravamen** set forth in the prior State

Court litigation, and adding only an application for injunctive relief anent the demolition of the subject building.

On the return date of an Order to Show Cause in the District Court, plaintiffs pointedly and specifically refused the opportunity afforded by the Court to modify the subject building so that it would comply with applicable zoning. Upon completion of the show cause application, the District Court denied the injunctive relief sought, finding that petitioners offered no probability of success upon trial.

Petitioners sought leave to appeal that interlocutory injunction denial to the Third Circuit. On hearing, Third

Circuit Judge Greenberg granted that leave, but denied the injunctive relief sought, on the basis that the statute, 42 U.S.C.A., Sec. 1983, which was the asserted basis for petitioners' relief, **authorized only a money damages award,** which was ruled to be an adequate **remedy at law.** Such adequate remedy justified the denial of extraordinary equitable relief sought, under the facts of the case.

The defendant BOROUGH proceeded with the demolition of the subject building, according to law.

On discrete Motions by the defendants for dismissal of the Complaint, for failure to state a claim upon which relief could be granted, the District Court found

that the prior State Courts had heard and determined all of the issues specified in the federal Complaint, and concluded that petitioners were precluded from relitigating all such matters.

On Motion of the Municipal Defendants, the District Court levied sanctions against the petitioners and petitioners' counsel, pursuant to Rule 11. On reconsideration, the District Court vacated the imposition of such sanctions.

Petitioners appealed the adverse rulings of the District Court to the Court of Appeals. After full briefing and argument the Third Circuit affirmed (DMa-19) * the

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* (DMa-) designates Appendix of Municipal Respondents

District Court decision on the basis that:

> ". . . Plaintiffs' federal claims were contained in plaintiff Antonino Enterprises's state court complaint and **the state court resolved them** adversely to plaintiffs. . . ." (Pa-7) *
>
> * * * * * * * * *
>
> ". . . In view of this state court history, the plaintiffs' claims are, as Judge Lifland properly concluded, **foreclosed in federal court** by the doctrine of res judicata and the New Jersey entire controversy doctrine." (Pa-8)
>
> * * * * * * * * *
>
> ". . . While plaintiffs' federal court action sought new remedies based on the demolition, plaintiffs assert **precisely the same constitutional issues as those raised in the state litigation** . . . . We are constrained, however, by res judicata and the entire controversy doctrine. Accordingly, the Order dismissing plaintiffs' complaint must be **affirmed.**" (Pa-9) (Emphasis Supplied)

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* **(Pa-)** designates Appendix of Petitioners

ARGUMENT

I

IT IS NOT A DEPRIVATION OF CIVIL AND CONSTITUTIONAL RIGHTS FOR THE FEDERAL COURTS TO REFUSE TO RETRY CAUSES OF ACTION TRIED AND APPEALED IN THE STATE COURTS

Enforcement of civil and constitutional rights most certainly entitles a litigant to a day in Court (trial and appeal), but only one. When that combined juridical event has been fairly and effectively essayed, the litigant's entitlement is exhausted. The matter then becomes res judicata effectuating a state of perpetual repose. And, much as the Saturday football game cannot be replayed on Monday, so too the cause cannot be relitigated.

The State Courts have concurrent jurisdiction with the Federal Courts to

determine constitutional issues. Bonner v. Cir. Ct. of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975), cert. den., 96 S.Ct. 1418, 424 U.S. 946, 47 L.Ed.2d 353 (1976).

Upon State adjudication, a Federal Court must give to the Judgment of a State Court the same preclusive effect as would be given that Judgment under the law of the State in which the Judgment was rendered. 28 U.S.C.A., Sec. 1738, Dennison v. County of Frederick, 726 F.Supp. 137 (W.D.Va. 1989), aff'd., 921 F.2d 50 (4th Cir. 1990), cert. den., 111 S.Ct. 2828, 115 L.Ed.2d 998 (1991).

In the case at bar, the pleadings, Pretrial Order and trial record in the

State Trial Court all demonstrated, to the District Court's satisfaction, that petitioners' purported constitutional and civil rights issues were framed, evidence adduced, were considered and determined by the State Trial Court (DMa-2). On appeal, all the constitutional and civil rights appellate issues were presented and adjudicated. (DMa-19) And it was as to these matters that the New Jersey Supreme Court denied Certification! 133 N.J. 433 (1993).

Upon plenary review, the District Court recognized the prior State Court consideration and determination of these issues, and dismissed petitioners' Complaint on defendants' Motions. (Psa-2) The Court of Appeals fully comprehended

the preclusive effect of the prior State Court adjudications and affirmed the dismissal of the District Court Complaint. (Psa-5) (Petitioners' Supplemental Appendix)

Such Federal Court determinations were no deprivation of civil and constitutional rights, but were merely a proper recognition of the true legal status of the matter and the right of defendants to the repose and preclusion of res judicata. Both the District Court (Psa-2) and the Court of Appeals (Pa-5) also recognized that the New Jersey entire controversy doctrine (R. 4:30A) precluded the consideration of issues that could have been raised, but were not, or parties that could have been joined, but were not.

II

THE MUNICIPAL DEMOLITION OF A 4 YEAR OLD HALF-BUILT NEW STRUCTURE WHICH THE OWNER REFUSES TO MODIFY TO CONFORM TO VALID ZONING REQUIREMENTS IS NOT CRUEL AND UNUSUAL PUNISHMENT

Petitioners' Complaint in the District Court never sought to invoke the protection of the Eighth Amendment to the United States Constitution. Nor did petitioners invoke Eighth Amendment protection before the Court of Appeals. Thus, petitioners' Eighth Amendment arguments have no genealogy in the case. Bridging such impediment, such arguments also lack factual or legal basis.

The Eighth Amendment to the United States Constitution simply reads:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Chief Justice Hughes, writing for a unanimous Court in In re Quinlan, 70 N.J. 10, 37-8 (1976), cert. den., 97 S.Ct. 319, 429 U.S. 922, 50 L.Ed.2d 289 (1977), held the Eighth Amendment irrelevant to matters other than **sanctions in criminal cases**:

". . . Historic in nature, it stemmed from punitive excesses in the infliction of criminal penalties. We find no precedent in law which would justify its extension to the correction of social injustice or hardship. . . . Yet the constitutional base of protection from 'cruel and unusual punishment' is plainly irrelevant to such social ills which must be remedied, if at all, under other concepts of constitutional and civil right."

In a footnote to the above passage, the Chief Justice further explained:

". . . [T]he cases construing it have consistently held that the 'punishment' contemplated by the Eighth Amendment is the penalty inflicted by a court for the commission of a crime or in the enforcement of what is a criminal law. . . . A deprivation, forfeiture or penalty arising out of a civil proceeding or otherwise cannot be 'cruel and unusual punishment' within the meaning of the constitutional clause." Id., at 37.

See also, Popow v. City of Margate, 476 F. Supp. 1237, 1242 (D.N.J. 1979) (Ftnt 2):

". . . **The Eighth Amendment is limited to criminal punishment.** Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L. Ed.2d 711 (1977); . . . Bell v. Wolfish, --- U.S. ---, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)." (Emphasis Supplied)

In considering this putative issue, it should be kept in mind that the demolition proceeded as an exercise of the defendant BOROUGH's **police powers**, pursuant to N.J.S.A. 40:48-2.3, which provides:

". . . Whenever any municipality. . . finds . . . any buildings which are unfit for . . . occupancy, or use, due to conditions . . . detrimental to the **health or safety or otherwise inimical to the welfare** of the residents of said municipality power is hereby conferred upon such municipality to **exercise its police powers to . . . demolish** . . . such building...." (Emphasis Supplied)

See also, N.J.S.A. 40:48-1.1, 40:48-2.3a and 40:48-2.5.

It is abundantly clear that the authority by which the subject building was demolished was not the criminal law, but the civil police powers of a governmental subdivision, conferred by express statute provision of the State Legislature.

III

A DEVELOPER WHOSE GRAVAMEN HAS BEEN ADJUDICATED AND DENIED IN STATE TRIAL AND APPELLATE COURTS IS NOT ENTITLED TO DAMAGES FOR LEGITIMATE POLICE POWER ACTION TAKEN BY A MUNICIPALITY WHERE NO NEW LEGAL OR EQUITABLE RIGHT EXISTS

The nub of the operative jurisprudential principles in this respect was fully grasped and articulated by Judge Becker for the Court of Appeals, as the fulcrum of its affirmance of the decision below in this case:

> "Plaintiffs have argued that these doctrines [res judicata, entire controversy and full faith and credit] do not bar the federal action because the property had not yet been demolished during the state [Court] proceedings. We are sympathetic to this claim, but unfortunately it is unavailing. While plaintiffs' federal court action sought new remedies based on the demolition, **plaintiffs assert precisely the same constitutional issues as those raised in the state litigation.** . . . We are con-

strained, however, by res judicata and the entire controversy doctrine. Accordingly, the order dismissing plaintiffs' complaint must be affirmed." (Pa-8) (Emphasis Supplied)

A new remedy addressing a further development in a case does not constitute a cause of action. The cause of action classically must consist of a duty, breach of that duty, with damage proximately caused. Once the duty and breach of that duty have been adjudicated and found wanting, there can be no phoenixlike revival from the ashes of litigation because a new remedy is invoked. It makes no difference whether the genesis of the duty implicated is federal or state law. This is the thrust and repose of res judicata, universally recognized in our legal system.

CONCLUSION

S.C.U.S.R. 10 specifies:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . ."

The "compelling reasons" exemplified in the Rule partake of an important and significant jurisprudential nature, either not settled by this Court or in conflict with this Court's prior determinations. Also implicated should be matters of compelling societal importance.

The matter at bar does not partake of a serious and consequential nature meriting this Court's attention. The subject matter involved is parochial: of concern

to the immediate parties, and the issues raised suffer the disability of having been previously considered and adjudicated by Trial and Appellate Courts of competent jurisdiction.

Moreover, plaintiffs' arguments are specious and the principles invoked are either not implicated in the array of facts or are not aptly applied.

Both the District Court and the Court of Appeals gave this matter plenary consideration and apparently strove mightily to find merit in plaintiffs' contentions. Those efforts had to yield to the settled requirements of legal principle, precedent and right reason.

Plaintiffs' Petition for Certiorari should be denied.

Respectfully submitted,

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Joseph A. Clark, Jr.

Dated: December 23, 1996

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SUPERIOR COURT OF NEW JERSEY

Benedict E. Lucchi
Judge

LETTER OPINION

April 10, 1991

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Re: Antonino Enterprises, Inc. v.
Cliffside Park Planning Board
Docket No. L-9350-90

Antonino Enterprises, Inc. v.
Frank Pollotta, et al.
Docket No. L-04926-90

Matesic v. Cliffside Park
Board of Adjustment, et al.
Docket No. L-4927-90

Dear Counselors:

Three consolidated cases are before

the court involving common issues pertaining to zoning in Cliffside Park. The plaintiff in two of the cases is Antonino Enterprises, Inc., a builder who has constructed a number of homes in Cliffside Park. Antonino owns lots located at 409 Nelson Avenue in Cliffside Park. On August 8, 1989, Cliffside Park adopted a new zoning ordinance changing the zoning applicable to Antonino's lot from and one and two-family zone to exclusively a one-family zone. On September 1, 1989, plaintiff submitted an application to Frank Pollotta, a Cliffside Park construction official, to build a two-family home on the lot, which had previously contained a single-family home.

On October 2, 1989, the building inspector issued a building permit for Antonino to construct a two-family house on the lot. However, his issuance of the permit was evidently a mistake. The home plaintiff seeks to build actually requires variances from the zoning ordinance for front yard set-back, rear yard set-back, lot coverage, lot area per dwelling unit and a waiver for an interior parking stall.

It was not until January 3, 1990, that the construction official realized that he had erred in the issuance of the building permit. He issued a stop-work order for the partially constructed home. Antonino then applied to the Cliffside

Park Board of Adjustment for the appropriate variances.

The Board of Adjustment heard extensive testimony on February 26, 1990. At this time Antonino presented the testimony of John C. Inglese, P.E., of the Tesis Architects. Inglese indicated that plaintiff's structure is a three story building, with three bedroom apartments on the upper two floors, while the basement level contained garages as well as a room and a bathroom. He noted that the lot coverage of the structure was 46.88 percent as compared to the 40 percent limitation of the ordinance. In addition, front yard and rear yard variances were required for the 20 fee yards on the

property as compared to the 25 foot requirement of the ordinance. Antonino also presented testimony from a professional planner on the character of the zone and surrounding lots. The viewpoints of several neighbors were offered at the hearing in opposition to plaintiff's construction. Antonino then amended his proposal and agreed to accept a restriction to a two-family home and made certain changes with regard to the layout and access to the first floor. However, on April 23, 1990, the board voted to deny the application.

At this time Antonino's structure is significantly completed. It is fully enclosed with a majority of windows in

place. Antonino has instituted these suits challenging the adoption process of the Cliffside Park zoning ordinance, and seeks to have the building permit reinstated so that the construction can be completed.

Also before the court is the companion case of Matesic v. Cliffside Park Board of Adjustment, et al. in which issues similar to those in Antonino are raised. The Matesic's own a slot on Oakdene Avenue which presently contains a fire-damaged single family home. The Matesics would like to tear down this structure and replace it with a two-family home for use by the parents and son and daughter-in-law.

However, the area is zoned for one-family use. The Matesics allege that the property is in close proximity to other multi-family structures. The Matesics sought approval form the Cliffside Park Board of Adjustment for a variance to construct a two-family home, but were denied, a denial which will stand as there has been no showing that it was arbitrary, capricious, or unreasonable.

The first assertion by the plaintiffs is that the Cliffside Park zoning ordinance was not properly adopted. I am not convinced that this is the case. The Borough has demonstrated that the zoning ordinance and map were filed with the County Planning Board on August 30, 1989,

and that these zoning regulations are reasonable in scope and requirement.

Furthermore, the issue of whether the present zoning ordinance was properly adopted is really of no moment to the question before us. While Antonino's property has changed to an exclusively one-family zone, Antonino is in violation of certain zoning requirements under either the former or present zoning ordinance. For example, even when viewed by the old standard, Antonino's project violates the lot coverage standard. Thus, no matter which ordinance was in effect, Antonino needed a variance to proceed with the construction.

Antonino and Matesic also claim that

the Juric property at the corner of Palisade Avenue and Grant Avenue is an example of the disparate treatment of property owners by the zoning authorities in Cliffside Park. Antonino alleges that at approximately the same time as his application was being rejected by the Board of Adjustment, Juric received approval to build a two-family home that is much larger than plaintiff's proposed structure.

However, after inspecting all three sites, I find this claim to be without merit, due to significant differences in the location of the property. Antonino's property is on a side street in a wholly residential area. The Juric structure is

located on one of the main thoroughfares in Cliffside Park, and is in close proximity to several high-rise apartment buildings and commercial properties. These significant differences in the character of the neighborhoods surrounding the subject properties clearly refutes Antonino's claim that he is entitled to similar zoning approvals as those granted to Juric. This Analysis applies equally to Matesic's claims. The Matesic property is located in a residential area some distance from any major road. The significant differences between the Juric and Matesic properties and their locations belie any comparisons of what is permitted to be constructed on each. The issuance

of variances is by nature fact-sensitive and what may be acceptable at one location may be totally inappropriate at another.

Perhaps the most troubling question raised is whether the Borough should now be estopped from revoking Antonino's building permit in light of the fact that Antonino worked on the house for about two months before the building permit was invoked and the structure is nearer to completion than not.

In support of their right to revoke the building permit permanently, defendants rely on the case of Jantausch v. Borough of Verona, 41 N.J.Super. 89 (Law Div. 1956), aff'd 24 N.J. 326 (1957). The relevant portion of the lower court

opinion in Jantausch sets forth three categories of cases in which the issue of whether a municipality is estopped from revoking a building permit will arise.

Antonino's case falls clearly into the category of there being "no semblance of compliance with or authorization in the ordinance" for the issuance of the permit. Jantausch, 41 N.J.Super. at 94. Notwithstanding plaintiff's claim that the Cliffside Park zoning ordinance is procedurally defective, plaintiff's project would at the very least be in violation of the zoning requirement concerning lot coverage under either the old or new ordinance, so this analysis is applicable in either situation.

As Jantausch indicates, under this category of cases "the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review." Jantausch, 41 N.J.Super. at 94. Under this set of facts there is as a matter of law no opportunity for the operation of estoppel in plaintiff's favor. The building permit was issued by the official; in complete contravention of the dictates of the zoning ordinance. Passage of time or raising of the structure do not validate this act. Although Antonino has expended considerable sums on construction of the building, this cannot undermine the clear

principle that the purpose of the zoning regulations is to protect the public good. Any project that runs counter to the zoning regulations and is not exempted from compliance by variance or other exception must be viewed as detrimental to the public interest. Simply because an official has committed a clear error in issuing a building permit does not mean that the public must bear the burden of this mistake. Allowing estoppel to operate in such instances confounds the purpose of zoning and results in harm to those that zoning is supposed to protect.

Furthermore, Antonino cannot claim that this project innocently proceeded, content in the belief that the building

permit validated the work. As the Tesis Architects' drawing of the Antonino site plan clearly indicates, the project required five variances. This drawing is dated September 11, 1989, the time of plaintiff's application for the building permit. Plaintiff is a builder who has worked in Cliffside Park on previous occasions, and knew or should have known from the clear language of the architect's site plan drawing that variances were required for this project before building permit could rightfully issue. Thus Antonino is not free from some amount of blame for this chain of events, seeing as construction proceeded despite knowledge that variances were required.

Finally, plaintiffs allege that their due process and equal protection rights were violated and seek relief under the Civil Rights Act. However, plaintiff raises only this general assertion without specific examples to support it. Further, my review of the record fails to reveal bad faith, maliciousness, or discriminatory intent on the part of the defendants. This claim is therefore denied.

In conclusion, I am satisfied that all claims by the plaintiffs, Antonino and Matesic, including those not expressly

discussed in this opinion, are clearly without merit and are thus denied.

Very truly yours,

/s/

Benedict E. Lucchi, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5166-90T5

ANTONINO ENTERPRISES, INC.
Plaintiff-Appellant

v.

[Filing Date
Oct 28, 1992]

CLIFFSIDE PARK PLANNING BOARD,
and

ANTONINO ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

FRANK POLLOTTA, Construction
Official of the Borough of
Cliffside Park; MAYOR AND COUNCIL
OF THE BOROUGH OF CLIFFSIDE PARK;
and CLIFFSIDE PARK BOARD OF
ADJUSTMENT,
Defendants-Respondents.

Argued Oct. 1, 1992 Decided Oct 28, 1992
Before Judges Brody, Thomas and Landau
On appeal from Superior Court of New Jersey, Law Division, Bergen County
Frederick L. Bernstein argued the cause for appellant
Randal W. Habeeb argued the cause for respondents (Diktas & Habeeb, attorneys)

PER CURIAM

Antonino Enterprises, Inc. (Antonino) appeals from a judgment of the Law Division, Bergen County, which rejected challenges to Cliffside Park's Zoning Ordinance and reexamined Master Plan, and its appeal from the Board of Adjustment denial of its request for a variance.

On August 8, 1989, the Borough of Cliffside Park held an adoption hearing on a new zoning ordinance ("Ordinance #17-89) which changed the zone of appellant's property from one which permitted two-family residential use to one restricting further development to one-family residential use. On September 1, 1989, appellant submitted an application and

architectural plans to the Cliffside Park construction official, for the construction of a two-family home on such property.

A building permit was mistakenly issued by the official on October 2, 1989. Antonino commenced construction soon thereafter. A stop Work Order was issued on January 3, 1990 by the construction official upon realizing his mistake. The Stop Work Order issuance was based upon violation of the one-family limitation of the new zoning ordinance. By that time, the building had been framed, footings were in and substantial costs had been expended.

On January 9, 1990 Antonino applied

to the Cliffside Park Zoning Board of Adjustment for use and bulk variances to Ordinance #17-89. A hearing on the application was held by the Cliffside Park Board of Adjustment on February 26, 1990.

Antonino requested the following variances from the provisions of Ordinance #17-89:

(1) Use variance for a two-family dwelling in a single-family zone. (Required: 1 family.) (Proposed: 2 family).
(2) Front yard variance (according to appellant's engineer). (Required: 25 feet.) (Proposed: 20 feet)
(3) Rear yard variance. (Required: 25 feet.) (Proposed: 20 feet.)
(4) Lot coverage variance. (Required: 40%.) (Proposed: 46.88%.)
(5) Lot area per dwelling unit variance. (Required: 5,000 square feet.) (Proposed: 2,500 square feet.)

Testimony from a professional planner was presented on the character of the zone and

the surrounding lots. Viewpoints of several neighbors were offered at the hearing in opposition to Antonino's construction. Some objections were based upon the fear that the house would be used for three family occupancy. Antonino agreed to amend its proposal to restrict the structure to two-family dwelling use.

At the conclusion of the hearing the Board denied the Antonino application.

An action in lieu of prerogative writ was filed in the Law Division on April 16, 1990, entitled Antonino Enterprises, Inc. v. Frank Pollotta, Construction Official of the Borough of Cliffside Park; Mayor and Council of the Borough of Cliffside Park; and Cliffside Park Board

of Adjustment, Superior Court of New Jersey, Law Division, Bergen County. This challenged the Board's decision as arbitrary, capricious and unreasonable, and also alleged discrimination based upon grant of a variance for similar purposes to another property owner (Juric).

On April 23, 1990 the Board of Adjustment adopted a resolution memorializing the denial of the Antonino application. The Board found in part that:

(1) the plaintiff proposed a prohibited use.
(2) the plaintiff did not provide proofs that the use would serve the public good.
(3) the use does not further the Land Use Act.
(4) the variances necessary would be inconsistent with the Zone Plan.

(5) the structure would block air and light.
(6) hardship was self-imposed.

A similar prerogative writ action was filed on April 16, 1990, by other parties. This action was entitled Matesic v. Cliffside Park Board of Adjustment; Park Construction Official; Mayor and Council of the Borough of Cliffside Park; and Stipo Juric, Superior Court of New Jersey, Law Division, Bergen County. This action also alleged discriminatory practice by the governing bodies based upon the approval of the Juric variances and the denial of the Matesics' request for variances.

On May 10, 1990 Cliffside Park adopted its "Reexamination of the Land Use

Plan, Master Plan, and Housing Element." See N.J.S.A. 40:55D-89.

Thereafter, on July 29, 1990 Antonino filed another complaint entitled Antonino Enterprises, Inc. v. Cliffside Park Planning Board, in which it challenged the Planning Board's Reexamination of the Master Plan as an unconscionable action contrary to the intent of the Land Use Law.

The above matters were consolidated for trial before the Honorable Benedict E. Lucchi. A nine-day trial commenced on December 18, 1990 and concluded on March 4, 1991.

During trial, the court admitted an expert report which referred to numerous

findings in the 1979 Master Plan to show that the changes adopted by Ordinance #17-89 were proposed as early as January, 1979 in the Borough's Master Plan and Land Use Element. Essentially, these findings enunciated a policy that problems in this highly urbanized community required that single family use be encouraged and that future two family and multi-family development or conversions should be restricted. The May 10, 1990 Reexamination Report reaffirmed these findings, thus supporting Cliffside Park's argument that Ordinance #17-89 is consistent with its Master Plan.

Following trial, the judge issued a letter opinion, which found: that the

Borough had demonstrated that ordinance #17-89 was properly filed with the Planning Board and was reasonable in its scope and requirements; that even under the prior ordinance Antonino would have required a lot coverage variance to proceed with construction; that a variance granted to Stipo Juric did not evidence disparate treatment due to the differing nature of the locations that an estoppel should not apply; and that Antonino's architectural plans showed that he knew or should have known of the existence of Ordinance #17-89 and the necessity to seek variances therefrom before proceeding. Judgments consistent with the opinion followed, and Antonino

appealed. The Matesics did not join in the appeal. We affirm.

Reexamination of Master Plan

Antonino asserts that Cliffside Park's failure to examine its municipal Master Plan by August 1, 1988 resulted in its total loss of authority to continue regulation of development. It is undisputed that the Borough did not adopt its Reexamination of the Land Use and Master Plan until May 10, 1990.

Arguing that this means that the Borough did not have in place a valid zoning ordinance or development restriction limiting the use of its property to a single family dwelling, Antonino cites an unpublished Law Division

opinion, Westfield, Inc. v. Twp. of Rochelle Park, decided November 1989. Our reading of Westfield satisfies us that it does not support Antonino's case.

Westfield involved a developer's application for site plan approval before the Planning Board of Rochelle Park. The application was prosecuted between August 1988 and August 1989 at a time when the Board had failed to adopt a Reexamination of Master Plan pursuant to N.J.S.A. 40:-55D-89. The court noted that the failure to adopt a timely re-examination triggered N.J.S.A. 40:55D-89.1.

The Westfield court concluded on the facts present that N.J.S.A. 40:55D-89.1 shifted the burden of proof from the

applicant to the municipality to sustain validity of its development regulations. However, only upon finding that the municipality offered no proof as to the reasonableness of its residential zoning designations, did the court declare that the plaintiff's land was unzoned.

Many of the questions arising out of N.J.S.A. 40:55D-89 and 89.1 were discussed in Lionshead Woods Corp. v. Kaplan Bros., 243 N.J.Super. 678 (Law Div. 1990). There it was stated that where the statutorily mandated review had not been performed, N.J.S.A. 40:55D-89.1 would be triggered and the municipality faced an "artificial presumption" of invalidity requiring it to meet both the burden of

going forward and the burden of proof. Id. at 683. On this reasoning, a municipality would have the burden to rebut the presumption of invalidity by evidence adequate to raise a debatable question as to its validity.

We believe that the defendants have offered not only sufficient proof to raise a debatable issue on the validity of Ordinance #17-89, but have also adequately demonstrated its consistency with the Master Plan.

Both the 1979 Master Plan and a later 1982 Reexamination Report found that too much of the Borough's limited area was zoned for two-family, multi-famuily, commercial and industrial usage.

Antonino does not dispute that Ordinance #17-89 is apparently consistent with the 1979 Master Plan, the 1982 Reexamination, and the 1990 Reexamination Report. It is apparent that the Legislature, through enactment of N.J.S.A. 40:55D-89 and 89.1, intended to ensure that a municipality's master plan and zoning ordinance reflect the most current and contemporary needs of the community. Medici v. BPR Co., 107 N.J. 1, 20 (1987). An appellate court should attempt to effectuate the most current policy declared by a legislative body. Kruvant v. Mayor & Council Tp. of Cedar Grove, 82 N.J. 435, 440 (1980). We therefore find that on August 8, 1989, Ordinance #17-89

was adopted and was consistent with the 1979 Master Plan, the 1982 Reexamination Report and the 1990 Reexamination Report of the Master Plan.

Planning Board Referral

Antonino also argues that the Borough failed to refer Ordinance #17-89 and its amendments to the Planning Board as required by N.J.S.A. 40:55D-64 and 26. Section 64 provides:

> Prior to the hearing on adoption of a zoning ordinance, or amendments thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board subject to subsection 17a of this act.

It is undisputed that the adoption hearing for Ordinance #17-89 was held on August 8, 1989. Defendants have set forth evidence

that the original zoning ordinance proposal was referred to the Planning Board which subsequently enacted a resolution calling for the adoption of said Ordinance.

However, it is also undisputed that several amendments were made to #17-89 at the time of the August 8th adoption hearing. Appellant contends that these changes were substantial and required referral of the Ordinance back to the Planning Board.

Several cases have held ordinances and amendments invalid for failure to refer them to the planning board prior to adoption. See Mulligan v. City of New Brunswick, 83 N.J.Super. 185, 189-90

(L.Div. 1964); Hasbrouck Heights Hosp. Ass'n v. Borough of Hasbrouck Heights, 15 N.J. 447, 454-55 (1954); Sheerr v. Evesham Tp., 184 N.J.Super. 11, 60 (L.Div. 1982).

However, it is important to note that, substantial or not, the questioned amendments to Ordinance #17-89 have no affect upon the Antonino property. When a portion of a zoning ordinance is declared invalid, the remainder will be left in force if such a course is consistent with the presumed intention of the municipal body, and if it can operate as an integrated unit independent of the invalid portions. Brundage v. Randolph Tp., 54 N.J.Super. 384, 395 (App.Div. 1959) aff'd. 30 N.J. 555 (1959); See also, Mountcrest

Est., Inc. v. Rockaway Mayor and Tp. Committee, 96 N.J.Super. 149, 156-57 (App. Div. 1967), certif. den., 50 N.J. 295 (1967) (court found that invalidity of open space provision amendments to zoning ordinance did not relieve builder of complying with lot size requirements since open space provisions were severable).

Ordinance #17-89 specifically provides for severability of invalid sections. A finding that the amendments of #17-89 are invalid would not impair the overall function of the ordinance nor relieve Antonino of the zoning requirements on its property. 1

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1 We note that for the same reasons, even if the Borough was required to publish each of the amendments to

PUBLICATION

Antonino says that the municipality failed to properly publish the ordinance pursuant to N.J.S.A. 40:49-2.1 because it did not adequately alert the public to the changes made, citing Wolf v. Shrewsbury, 182 N.J.Super. 289 (App.Div. 1981), certif. den., 89 N.J. 440 (1982) for this proposition. There, having found that the publication did not alert the public to the nature and scope of the proposed that the ordinance was invalid. Id. at 295-296. However, in Shrewsbury the notice merely informed the public in general

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1 cont.:

Ordinance #17-89 and failed to do so, the invalidity of the amendments would not entitle appellant to relief.

terms that the new ordinance was being revised to conform with the Master Plan and contained no indications of what type of changes would occur. The notice in the present case, however, provided adequate notice to the public of the scope and nature of the provisions within the new Ordinance. It stated that the former zoning ordinance would be replaced in its entirety and listed numerous specific headings illustrative of the broad scope of what was addressed in the new Ordinance (i.e., residential and commercial zone regulations, conditional uses, parking, signs, performance standards, design standards, etc.). Furthermore, appellant admits in its brief that it was present at

the hearing which considered Ordinance #17-89. We find that the Borough's publication of Ordinance #17-89 adequately informed the public of the essence and scope of the broad changes the Ordinance would effectuate.

REASONABLENESS OF VARIANCE DENIAL

Antonino contends that the Board's decision in denying its variance request was arbitrary, capricious and unreasonable. We disagree.

Our review is limited to determining whether the Board's decision was arbitrary, unreasonable or capricious.

Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-297 (1965). This standard stems from the recognition that local officials "who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications for a variance." Ward v. Scott, 16 N.J. 16, 23 (1954). Variances should be granted sparingly and with caution, since they tend to impair sound zoning and subvert the zone plan. Cerdel Construction Co., Inc. v. East Hanover Tp., 86 N.J. 303, 307 (1981). Consequently, a court should give greater deference when the appeal is from

a denial of a variance. Mahler v. Bd. of Adjustment, Fair Lawn Borough, 94 N.J. Super. 173, 186 (App.Div. 1967), aff'd o.b., 55 N.J. 1 (1969).

To grant a variance under N.J.S.A. 40:55D-7(d), a board must find that (1) special reasons exist for the variance, and (2) the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Cerdel, supra 86 N.J. at 307. The applicant must produce the evidence demonstrating that it meets these statutory requirements. Chirichello v. Zoning Board of Adjustment, Monmouth Beach, 78 N.J. 544, 559-560

(1979).

Despite the very broad parameters of the phrase "special reasons," the overwhelming majority of (d) variance cases fit within one of three categories of special reasons: (1) hardship; (2) the use is an inherently beneficial one, such as a school or hospital, and (3) the use is not inherently beneficial but promotes the general welfare because of its peculiar suitability to the particular location. Medici v. BPR Co., 107 N.. 1, 9-18 (1987). The question before the reviewing court is whether the record before the zoning board revealed special reasons taken in their aggregate. Kramer supra, 45 N.J. at 287.

Upon review of the record before the zoning Board, it is apparent that appellant's argument to the Board focused upon the existence of older two-family lots on the block and other structures of similar bulk.

These arguments, however, do not establish "special reasons". Case law is clear that the existence of other nonconforming uses, even if permitted by variance, provides no ground for granting yet another variance. Ward v. Scott, 11 N.J. 117 (1952). See also Loscalzo v. Pini, 228 N.J.Super. 291, 300-301 (App. Div. 1988), certif. den., 188 N.J. 216 (1989) (a large number of non-conforming structures in the neighborhood where

defendants' building is located is not a criterion on which special reasons may be based).

Furthermore, the fact that appellant's property is substantially built does not constitute a "special reason". The courts have held that personal economic hardship does not constitute a "special reason". See Loscalzo, supra, 228 N.J.Super. at 301-303 (substantial sums were expended in reliance on a mistakenly issued permit did not constitute undue hardship) Keller v. Town of Westfield, 39 N.J.Super. 430, 435 (App.Div. 1956) (undue hardship arising from money expended in making improvements did not qualify as special

reasons contemplated by statute for variance awardance); V.F. Zahodiakin &c., Corp. v. Bd. of Adjustment, Summit, 8 N.J. 386, 395-96 (1952) (zoning officers' disregard of ordinance, and expenditure of moneys by builder for prohibited use will not validate grant).

In determining whether an applicant has established the requisite "special reasons" for a variance, only those reasons which advance the general purposes of zoning as set forth in N.J.S.A. 40:55D-2 may be considered. Loscalzo v. Pini, supra, 228 N.J.Super. at 300-301; Medici, supra, 107 N.J. at 18. Antonino did not set forth any evidence below which would support such a finding. To the contrary,

defendants have presented evidence that the 1979 Master Plan, 1982 Reexamination Report, and the 1990 Reexamination Report list excessive two-family zoning as a problem to be corrected.

The proposed two-family structure does not further the purpose of planning in Cliffside Park. This fact alone would be justification for denial by failure to show the nonexistence of a "negative criteria". Lack of negative criteria must be shown in all variance cases. In Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J.Super. 509, 516 (App.Div. 1976), certif. den., 73 N.J. 55 (1977), a subsection (d) case, the court stated:

> It was not the burden of the board to find affirmatively that the plan

would be substantially impaired (although it did so in the instant case). It was, rather the burden of the applicant to prove the converse. See Ring v. Mayor and Council of Rutherford, 110 N.J.Super. 441, 445 (App.Div. 1970), certif. den., 401 U.S. 911, 91 S.Ct. 876, 27 L.Ed.2d 810 (1971).

The findings of the Board and the trial judge echo this analysis and were not unreasonable.

ESTOPPEL

Antonio also urges that his reliance on the mistakenly issued building permit should be held to estop Cliffside Park from issuing the Stop Work Order. The starting point for review of such an argument is Jantausch v. Borough of Verona 41 N.J.Super. 89 (L.Div. 1956), aff'd., 24 N.J. 326 (1957). Judge (later Chief Justice Weintraub there held that an

estoppel depends upon the circumstances surrounding the issuance of the permit. By way of dictum, Jantausch, refers to three categories in which the issue of estoppel may arise: (1) where a permit is regularly issued in accordance with the ordinance, it may not be revoked after reliance unless there is fraud; (2) where there is no semblance of compliance with or authorization in the ordinance, the deficiency is jurisdictional and estoppel cannot be asserted; and (3) the "intermediate situation" where the administrative official in good faith makes an erroneous interpretation of the ordinance and the property owner relies in good faith. Id. at 93-94. Only in the third category can

an estoppel be established. Here, the trial judge found that this case fell within the second category where there was "no semblance of compliance with or authorization in the ordinance". We agree.

The case of Howland v. Freehold, 143 N.J.Super. 484 (App.Div. 1976), certif. den., 72 N.J. 466 (1976) aptly states that a finding of "good faith" on the part of the administrative official can only be satisfied by finding that "an issue of construction of the zoning ordinance. . . was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted without any reasonable basis. . . ."

The zoning officer's admitted mistake

in allowing a two family home in a one family zone precludes a finding that the issuance of the permit had any reasonable basis. The permit was in complete contravention of the duly enacted ordinance with which he should have been familiar. This case clearly falls within the second category of Jantausch and the estoppel argument fails.

Furthermore, as the trial court touched upon, Antonino's architect plan was dated September 1, 1989. A finding that Antonino knew or had reason to know that the permit requested would violate the zoning ordinance is justified on this record.

We have considered the other argu-

ments raised by Antonino: that the Board of Adjustment's attorney's also participated as the Planning Board attorney and his involvement in drafting Ordinance #17-89 constituted a conflict of interest entitling appellant to relief; that representation of all the municipal defendants by a single attorney is against statutory mandates; that eh Mayor influenced the Board's decision in denying the variance and in granting the Juric variance, thus constituting 42 U.S.C., Sec. 1983 claim of discrimination; that appellant's initial variance application should be deemed reclassified as though made under N.J.S.A. 40:55D-70(a); that the Borough adopted Ordinance #17-89 without

the existence of a Land Use Plan and therefore such adoption was ultra vires; that the Board of Adjustment failed to render its decision within the 120 day time limit of N.J.S.A. 40:55D-73; that the ordinance did not take effect until after the town filed the latest zoning map with the Planning Board pursuant to N.J.S.A. 40:55D-16; that the Board of Adjustment's Resolution vote was in violation of N.J.S.A. 40:55D-10, and find that each of these remaining issues is clearly without merit, (R. 2:11-3(e)(1)(E)) and does not warrant further discussion, either as a matter of law or because the record establishes no support for the argument. See DeLuca v. Kahr Bros. Inc., 171 N.J.

Super. 100 (L.Div. 1979); Patel v. Planning Board of the Township of Woodbridge, 258 N.J.Super. 437 (L.Div. 1992); Lizak v. Faria, 96 N.J. 482, 492-95 (1984).

Affirmed.